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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVY KELVIN POUGH,

Defendant and Appellant.

D070701

(Super. Ct. No. SCD183193)

APPEAL from an order of the Superior Court of San Diego County, David J.

Danielsen, Judge. Affirmed.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Eleven years after his conviction arising from a guilty plea, Davy Kelvin Pough filed a motion to recall his sentence under Penal Code<sup>1</sup> section 1170. The motion was denied and Pough now appeals from the denial. We will affirm the trial court's decision.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

## FACTS AND PROCEDURAL BACKGROUND

In 2005 Pough entered into a plea bargain in which he pleaded guilty to attempted murder (§§ 187, 664) and assault with a semiautomatic firearm (§ 245, subd. (b)). He admitted personal use of a firearm (§ 12022.5, subd. (a)). The agreement called for a stipulated sentence of 20 years four months. The agreement also contained a "*Blakely*" waiver waiving the right to a jury determination of facts affecting the sentence. (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*)). Pough was sentenced in accordance with the plea agreement.

Pough later moved to withdraw his plea and then appealed the denial of the motion. His request for a certificate of probable cause was denied. (§ 1237.5.) This court affirmed the conviction and sentence in December 2005.

Thereafter Pough filed three petitions for writ of habeas corpus, which were each denied.

In May 2016, Pough filed his current motion to recall the sentence on the ground the upper term sentence imposed was unauthorized. The trial court found none of the conditions for recall of the sentence under section 1170 had been met and that the court did not have jurisdiction to grant the requested relief. Pough now appeals from the denial of his motion to recall the sentence.

Appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), indicating she has not discovered any arguable issue for reversal on appeal. Counsel asks this court to review the record for error as mandated by *Wende*.

We offered Pough the opportunity to file his own brief on appeal. Pough has responded with a supplemental brief, again contending his upper term sentence on the firearm enhancement was unauthorized. We will address Pough's brief below.

## DISCUSSION

Dealing first with Pough's brief, we find it does not present any arguable issue for reversal. Essentially, Pough challenges one component of a stipulated sentence entered in 2005. The sentence has been affirmed on appeal and the challenge rejected on petitions for writ of habeas corpus a number of times. Pough specifically waived his rights under *Blakely, supra*, 542 U.S. 296 to a jury determination of facts which would support an upper term sentence. His brief does not offer any issues regarding the jurisdiction of the court under section 1170 to recall the sentence, save for his unsupported statement that the upper term for the enhancement was "unauthorized," which it is not.

We turn then to the *Wende* brief filed by counsel. Counsel has complied with the mandates of *Anders v. California* (1967) 386 U.S. 738 (*Anders*), by identifying a possible issue:

Whether the trial court erred in finding it did not have jurisdiction under section 1170, subdivision (d) to recall the 2005 sentence.

We have reviewed the entire record as mandated by *Wende, supra*, 25 Cal.3d 436, and *Anders, supra*, 386 U.S. 738, and have not discovered any arguable issue for reversal on appeal. Competent counsel has represented Pough in this appeal.

DISPOSITION

The order denying the motion to recall the sentence is affirmed.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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AARON, J.